

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

PIOQUINTO PENALOZA-BANOS)
)
Petitioner,)
) 1:12CV611
v.) 1:06CR434-2
)
UNITED STATES OF AMERICA,)
)
Respondent.)

ORDER

This matter is before this court for review of the Recommendation and Order ("Recommendation") filed on November 20, 2012, by the Magistrate Judge in accordance with 28 U.S.C. § 636(b). (Doc. 101.) In the Recommendation, the Magistrate Judge recommends that Petitioner's "Rule 60(b)" motion (Doc. 100) be denied to the extent that it does seek to raise a claim under Rule 60(b), that it otherwise be construed as an attempt by Petitioner to file a second or successive § 2255 action, and that this action be dismissed due to Petitioner's failure to obtain certification from the Fourth Circuit as required by 28 U.S.C. §§ 2244 and 2255 and the Fourth Circuit Local Rule 22(d). The Recommendation was served on the parties to this action on November 20, 2012. (Doc. 102.) Petitioner filed timely objections (Doc. 103) to the Recommendation.

This court is required to "make a de novo determination of those portions of the [Magistrate Judge's] report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b) (1). This court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the [M]agistrate [J]udge. . . . [O]r recommit the matter to the [M]agistrate [J]udge with instructions." *Id.*

This court has appropriately reviewed the portions of the Recommendation to which objection was made and has made a de novo determination which is in accord with the Magistrate Judge's Recommendation. This court therefore adopts the Recommendation.

IT IS THEREFORE ORDERED that the Magistrate Judge's Recommendation (Doc. 101) is **ADOPTED**. **IT IS FURTHER ORDERED** that Petitioner's "Rule 60(b)" motion (Doc. 100) is **DENIED** to the extent that it seeks to raise a claim under Rule 60(b) and that it otherwise is construed as an attempt by Petitioner to file a second or successive § 2255 action. **IT IS FURTHER ORDERED** that this action is dismissed without prejudice for failure to obtain certification from the Fourth Circuit as required by 28 U.S.C. §§ 2244 and 2255 and the Fourth Circuit Local Rule 22(d). A Judgment dismissing this action will be entered contemporaneously with this Order. Finding no

substantial issue for appeal concerning the denial of a constitutional right affecting the conviction, nor a debatable procedural ruling, a certificate of appealability is not issued.

This the 14th day of May, 2013.

William L. Osten, Jr.
United States District Judge